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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 617.

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF SAID WRIT.

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MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF SAID WRIT.

Respondent opposes the granting of the petition for a writ of certiorari as prayed for by petitioner upon the ground that no federal question is involved.

FACTS.

Following the taking of the 1930 census and by virtue of 46 St. L., c. 28, adopted June 18, 1929, Minnesota became entitled to nine representatives in the congress of the United States (folio 3). It had previously had ten such representatives. The two houses of the legislature of the state, by

a majority vote (ff. 4-6), adopted House File 1456 (ff. 4, 5), dividing the state into nine congressional districts. After such passage the bill was presented to the governor who returned it to the house of representatives with his reasons for refusing to approve (ff. 6, 7). On the day following its return the house of representatives adopted a resolution directing that the enrolled copy of the bill be deposited with the secretary of state and remain a part of the permanent records in that office (f. 8). H. F. 1456 was deposited as directed and now reposes in the office of the secretary of state, and appears in the 1931 session laws at page 640.

Conceiving that his rights as a citizen, elector and taxpayer residing in the fourth ward of the city of Minneapolis, in the county of Hennepin, in the state of Minnesota, had been infringed, petitioner brought this action in the district court of Ramsey county against the secretary of state praying that the court "declare invalid any and all filings for the nomination to the office of representative in congress in the state of Minnesota designating a subdivision of the said state as a congressional district; enjoin said secretary of state from receiving any filings for the office of representative in congress in the state of Minnesota which designate a subdivision of said state as a congressional district; and enjoin said secretary of state from giving any notice of the holding of elections for the office of representative in congress in the state of Minnesota designating a subdivision of said state as a congressional district, and for such other, further and different relief as to the court may seem just and proper" (f. 14).

A general demurrer to the petition was sustained by the trial judge (ff. 14, 15). Petitioner appealed from this order to the state supreme court (f. 15). The order of the district court was affirmed (ff. 38-60). *State ex rel. Smiley*

vs. Holm, 184 Minn....., 238 N. W. 494. Upon remittitur to the district court, judgment was entered dismissing petitioner's action upon the merits (f. 16). Timely appeal from this judgment was taken (f. 17) and the judgment affirmed by the supreme court of Minnesota, its court of highest resort (f. 17) and judgment to that effect entered November 17, 1931 (f. 18). *State ex rel. Smiley vs. Holm,* 184 Minn....., 238 N. W. 792. This is the judgment which petitioner seeks to bring up for review.

THE ISSUE.

The sole point at issue here is whether the action of the legislature of Minnesota in redistricting the state for congressional purposes by H. F. 1456 offends against the constitution and/or statutes of the United States.

SUMMARY OF ARGUMENT.

1. Each State Is the Judge of What Constitutes Its Legislature.
2. The Validity of No Statute of the United States Was Drawn in Question.
3. No Statute of Minnesota Was Drawn in Question on the Ground of Its Being Repugnant to the Constitution, Treaties or Laws of the United States.
4. No Privilege or Immunity Was Properly Claimed by Petitioner under the Constitution or Statutes of the United States, Nor Was He Denied Equal Protection of the Laws.
5. Whether H. F. 1456 Is Invalid Because the Districts Created Therein Are Not Compact and Composed of Contiguous Territory and Because of Inequalities in

Population Is a Political and Legislative Rather Than a Judicial Question.

6. That House File 1456 Is a Valid Determination by the Legislature Has Been Foreclosed by the Decision of the Court Below.

ARGUMENT.

1. Each State Is the Judge of What Constitutes Its Legislature.

Article I, section 4, of the federal constitution, reads in part as follows:

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing senators."

Article I, section 5, of the same instrument, contains this provision:

> "Each house shall be the judge of the elections, returns and qualifications of its own members. * * *"

Article 4, section 1, of the constitution of Minnesota, provides, among other things that

> "The legislature shall consist of the senate and house of representatives, which shall meet biennially at the seat of government of the state, at such time as shall be prescribed by law. * * *"

Article 4, section 23, of the state constitution, provides that

> "* * * at their first session after each enumeration made by the authority of the United States, the legislature

shall have the power to prescribe the bounds of congressional, senatorial and representative districts and to apportion anew the senators and representatives among the several districts according to the provisions of section second of this article."

The constitution of the United States thus gives authority to the legislature of each state to "prescribe" the times, places and manner of holding elections for representatives in congress. What constitutes the legislature of a state? The federal constitution does not require that a state legislature shall consist of two representative bodies, nor, indeed, that it be constituted in any particular or peculiar way. Generally, legislatures are the law-making body of a state, representative of the people.

Hawke vs. Smith, 253 U. S. 221.
Brooks vs. Fischer, 79 Cal. 173.
Barlotti vs. Lyons, 182 Cal. 575.
Decher vs. Secretary of State, 209 Mich. 565.
Ex parte Dillon, 262 Fed. 563.
In re Opinion of the Justices, 118 Me. 544.

We take it that the people of Minnesota or of any other state might by appropriate constitutional amendment provide for the election or even the appointment of a single body of men authorized to make laws, subject to executive veto or not, as deemed best. The legislature of a state might conceivably be a small board, commission or committee. The governor might or might not have a veto power over the actions of such a legislature. What constitutes the legislature of a state is peculiarly a matter for the people of that state. When a question arises as to whether or not the "legislature" of a state has acted in accordance with the constitution or laws of that state, the judgment

of the highest court of that state is conclusive on the question.

The people of Minnesota have said that the "legislature shall consist of the senate and house of representatives." The highest court of Minnesota has said that when acting in the matter of prescribing congressional districts, the legislature consists of these two representative bodies and that the governor has no control over the determination of these two houses.

Is not this sufficient? Wherein does the constitution of the United States require that such action be subject to the veto power of the chief executive of the state?

It has been said that at the time of the adoption of the federal constitution only three states, namely, Massachusetts, New Hampshire and New York had seen fit to grant the veto power to their governors. (See Congressional Record, Vol. 71, Part 3, page 2445.) It cannot be contended, therefore, with any force, that the framers of the constitution had in mind that the actions of the state legislatures in prescribing congressional districts, must be approved by the chief executives of the states.

It is respondent's position:

(a) That article I, section 4, of the federal constitution, grants to the "legislature" of each state the power to prescribe the times, places and manner of holding elections for representatives in congress, subject to the right of congress to alter such regulations.

(b) That it is for each state to determine what constitutes its legislature for this purpose.

If this is true, then no federal question is involved because the federal government is not concerned with the manner in which a state legislature is constituted.

In *State of Ohio on Relation of Davis vs. Hildebrandt*, 241 U. S. 565 (567), in speaking of the power of referendum as reserved to the people by the constitution of Ohio, this court said:

> "Without going into the many irrelevant points which are pressed in the argument and the various inapposite authorities cited, although we have considered them all, we think it is apparent that the whole case and every real question in it will be disposed of by looking at it from three points of view—the state power, the power of Congress, and the operation of the provision of the Constitution of the United States referred to.
>
> "1. As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject and makes it clear that so far as the State had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative, is conclusively established to be wanting in merit."

This court affirmed the judgment of the state court, saying (page 570):

> "It is apparent from these reasons that there must either be a dismissal for want of jurisdiction because there is no power to reexamine the state questions foreclosed by the decision below and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent as to the result which of the two be applied."

Since this court held in the case cited that the decision

of the court below foreclosed the matter so far as the state power was concerned, we think it follows that in the case at bar this court is foreclosed by the decision of the supreme court of Minnesota as to what constitutes the legislature of that state when acting in the matter of dividing the state into congressional districts.

Congress has provided that Minnesota shall have nine representatives in the house of representatives in congress. Whether they shall be elected by districts or at large is a matter for Minnesota to decide. Congress, in accordance with precedent, will seat the duly elected representatives of this state no matter which plan is adopted in this state.

McCrary on Elections, 4th Ed., §§191, 192.

Election Contest, 1 Bartlett 47-55.

Election Contest of Phelps and Cavanaugh, 1 Bartlett 248.

It is well recognized that, in theory at least, a representative in congress represents the entire state from which he comes and not a particular district.

It is true that the state constitution, article 4, section 11, provides that

> "Every bill which shall have passed the senate and house of representatives in conformity to the rules of each house and the joint rules of the two houses shall, before it becomes a law, be presented to the governer of the state. If he approves he shall sign and deposit it in the office of the secretary of state for preservation and notify the house where it originated of the fact. But if not, he shall return it, with his objections, to the house in which it shall have originated; when such objections shall be entered at large on the journal of the same and the house shall proceed to reconsider the

bill. If, after such reconsideration, two-thirds of that house shall agree to pass the bill it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if it be approved by two-thirds of that house, it shall become a law. * * *"

The court below held that in districting the state the legislature was acting, not strictly in the discharge of legislative duties as a law-making body acting in a sovereign capacity, but more as an agent of the federal government (f. 47). It also held that in Minnesota, at least, under the state constitution, the governor possessed no veto power over the action of the state legislature when performing this federal function. Specifically, the court said (f. 47):

"The governor's veto has no relation to such matters; that power pertains, under the state constitution, exclusively to state affairs."

It may be that in other states, under different state constitutions, or under state constitutions differently construed, the governor has such veto power. If it is the will of the people of the state, as interpreted by the highest court of that state, that the governor's approval is not necessary to give potency to such a regulation of the legislature, all well and good. The question is one for each state to determine for itself. The framers of the federal constitution went only so far as to impose this duty upon the legislatures of the several states. The matter of determining who make up the legislature of a particular state was left to the people of that state.

In *McPherson vs. Blacker*, 146 U. S. 1 (25), this court held that under the second clause of section I, article 2, of the federal constitution the legislature possesses a plenary

authority to direct the manner of appointing presidential electors and that the whole subject is committed to the state legislatures. This court said (page 27):

> "The State also acts individually through its electoral college, although, by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided.
>
> "The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

It therefore follows that H. F. 1456, being a valid action of the legislature of Minnesota, as determined by its supreme court, is not repugnant to either the constitution or statutes of the United States.

2. There Was Not Drawn in Question the Validity of a Statute of the United States.

Two federal statutes were discussed and involved to some extent in this proceeding, viz.: 37 St. L., c. 5, being the reapportionment act of 1911, and 46 St. L., c. 28, being the census and reapportionment act of 1929.

In order that certiorari will lie to review a judgment of a state court of highest resort on the ground that there was drawn in question the validity of a statute of the United States it must affirmatively appear that the federal question was raised in the state court before final decision.

Scudder vs. Comptroller of New York, 175 U. S. 32.

Chapin vs. Fye, 179 U. S. 127.

Chicago, Indianapolis & Louisville Railway Company vs. Hackett, 228 U. S. 559.

The question must be substantial,

Hixon vs. Oakes, 265 U. S. 254,

and not frivolous,

Erie Railroad Company vs. Solomon, 237 U. S. 427.

Where the decision of the state court rests upon two grounds, and the ground independent of the federal question is sufficient to sustain it, the United States Supreme Court will not take jurisdiction.

Cuyahoga River Power Company vs. Northern Realty Company, et al., 244 U. S. 300.

Browne vs. Union Pacific Railroad Company, 267 U. S. 255.

The lower court in the case at bar did not pass on the validity of the federal statute cited. It held that the 1911 apportionment act of congress had expired by its own terms —that it affected only the actions of state legislatures in dividing their respective states into congressional districts under the apportionment of representatives in congress made by the 1911 act—that the 1911 act was so limited by its own language and so replaced by subsequent law that it was no longer upon the scene (ff. 42, 43, 52). The 1911 act was not held to be invalid. The holding of the state court was that by its own terms the 1911 act ceased to be of efficacy when the 1929 census and apportionment act was approved and became a law.

This was not tantamount to drawing in question the validity of the 1911 act.

The 1929 act was not questioned at all. Both parties

agreed that it was a valid act of congress. In this state of the record respondent urges that the validity of federal statutes was not drawn in question by this proceeding and that this court should not take jurisdiction upon that ground.

3. No Statute of Minnesota Was Claimed to Be Repugnant to the Constitution and/or Laws of the United States.

H. F. 1456 was not a statute of the state of Minnesota. No one claimed it was a statute. For the petitioner it was asserted that H. F. 1456 was not a valid enactment of the legislature because not approved by the governor or passed over his veto (f. 12). The state constitution, article 4, section 11, was relied upon by the petitioner. The supreme court of Minnesota construed this section of the state constitution and also article 4, section 23, and held that under this section the approval of the governor was not necessary to make effective a determination of the state legislature forming congressional districts.

Petitioner's attack was upon the validity of H. F. 1456 as a statute of the state.

If the state constitution had contained no provision giving the governor a power of veto, undeniably he would have obtained no such right by virtue of either the federal constitution or any subsisting federal statute.

If the constitution of Minnesota provided for a lawmaking body or legislature consisting, for example, of three men appointed by the governor or elected at large without any right of veto on the part of the governor, would not congress accept the determination of such a body as final? Is it not a question for each state as to what constitutes its legislature in carrying out the mandate contained in article I,

section 4 of the federal constitution?

The constitution of Minnesota contains an explicit direction to the legislature in article 4, section 23, to the effect that following each federal census enumeration "the legislature shall have the power to *prescribe* the bounds of congressional * * * districts." The supreme court of Minnesota has said: "The governor's veto has no relation to such matters; that power pertains, under the state constitution, exclusively to state affairs" (f. 47). We believe such construction is binding upon this court.

The question of whether or not a state statute conflicts with the constitution of a state is settled by the decision of its highest court.

Carstairs vs. Cochran, 193 U. S. 10.

Quong Ham Wah Company vs. Industrial Commission, 255 U. S. 445.

Terrace vs. Thompson, 263 U. S. 197, affirming 274 Fed. 841.

The validity of a state statute under the state constitution will not be inquired into by the supreme court of the United States. Such inquiry involves questions of local law only and the decision of the supreme court of a state is controlling.

First National Bank of Garnett vs. Ayers, 160 U. S. 660.

Lindsley vs. Natural Carbonic Gas Company, 220 U. S. 61.

Price vs. Illinois, 238 U. S. 446.

Montana vs. Rice, 204 U. S. 291.

That incidentally the state court expressed the opinion that the word "legislature" as used in article I, section 4 of the federal constitution means the two houses of the legislature only does not create a federal question. Such deter-

mination was not necessary to the decision below. Since it was not necessary and the decision in respect to the state matters involved was all that was required, this court should not take jurisdiction.

Petitioner's objections to H. F. 1456 were not that its substance was invalid because in conflict with the federal constitution or statutes. *His objections were to the manner in which the legislature acted.* This is shown by reference to the petition filed in the state district court (ff. 5-8, 12).

Whether a state legislature acts in accordance with the constitution of that state is a state and not a federal question.

4. IT IS APPARENT THAT NO PRIVILEGE OR IMMUNITY OF THE PETITIONER UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES IS INFRINGED AND THAT HE IS NOT DENIED "EQUAL PROTECTION OF THE LAWS."

Petitioner invokes the fourteenth amendment to the federal constitution, because of inequalities in the population of the nine congressional districts. It is asserted that the voters in the districts containing the larger populations are in some manner discriminated against and deprived of some right guaranteed by the federal constitution.

The fourteenth amendment in section 1 deals with privileges and immunities of citizens of the United States and the right of suffrage is not one of them.

This amendment does not add to the privileges and immunities of citizens.

Minor vs. Happersett, 21 Wall. 162.

State ex rel. Engelhard vs. Weber, 96 Minn. 422.

The right of voting is a privilege arising under the constitution of the state and not under the constitution of the

United States. If the right belongs to any particular person, it is because such person is entitled to it by the laws of the state where he offers to exercise it and not because of citizenship of the United States.

Pope vs. Williams, 193 U. S. 621 (632).
United States vs. Anthony, 11 Blatchf. (U. S.) 200.

In *McPherson vs. Blacker,* 146 U. S. 1, this court had under consideration a statute of the state of Michigan providing for the election of presidential electors by districts, *i. e.,* the voter in a particular district voted for one presidential elector only and not for all the electors running on a general ticket. Article 2, section 1 of the federal constitution provides:

> "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

The plaintiffs sought to have this act declared void because of conflict with the fourteenth amendment.

In holding that the fourteenth amendment could not properly be invoked (page 38) the court said:

> "The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been." Citing *U. S. vs. Cruikshank,* 92 U. S. 542; *United States vs. Reese,* 92 U. S. 214.

On page 38 of the McPherson decision the court further said:

> "The first section of the fourteenth amendment does not refer to the exercise of the elective franchise,"

and again on page 40:

> "If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has a right to vote the same as any other citizen has, no discrimination is made. Unless the authority vested in the legislatures by the second clause of section 1 of Article II has been divested and the State has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect."

In short, this court held that since it was within the power of each state to appoint in such manner as the legislature thereof might direct the number of electors to which it was entitled, there was no infringement of the right of any citizen of Michigan because he was permitted to vote for one elector only. Each citizen had the same right as any other citizen in this respect. In Minnesota, under H. F. 1456, each citizen has the same right as any other citizen to vote for one representative in congress from his district. Because there may be fewer voters in one than in another congressional district does not infringe any immunity or right of the petitioner herein guaranteed to him by the constitution. Every citizen of Minnesota is equally affected by H. F. 1456. Each may vote for one candidate for congress in the district in which he resides.

Clearly the fourteenth amendment may not be successfully invoked in this case.

5. CONSIDERATIONS OF POPULATION AND COMPACTNESS OF THE SEVERAL DISTRICTS ARE POLITICAL RATHER THAN JUDICIAL QUESTIONS.

The dividing of territory into legislative districts is a legislative function. It is a matter which in the very nature of things requires the exercise of discretion. Such discretion is to be exercised by the legislative body empowered to create these districts and not by the courts. The rule appears to be well established that the courts will interfere only when such discretion is plainly and grossly abused.

State ex rel. Meighen vs. Weatherill, 125 Minn. 336.
Donovan vs. Suffolk County, etc., 225 Mass. 55, 2 A. L. R. 1334.
People ex rel. Carter vs. Rice, 135 N. Y. 473.
People ex rel. Woodyatt vs. Thompson, 155 Ill. 451.
In re Baird, 142 N. Y. 523.
State ex rel. Warson vs. Howell, 92 Wash. 540.
Wise vs. Bigger, 79 Va. 269.

In the last cited case the general assembly of the state of Virginia divided the state into congressional districts. On the question of inequality of population, on page 282 of the opinion, the court used this language:

> "The laying off and defining of the congressional districts is the exercise of a political and discretionary power of the legislature, for which they are amenable to the people, whose representatives they are."

In *Richardson vs. McChesney,* 128 Ky. 363, 108 S. W. 322, 129 A. S. R. 299, the supreme court of Kentucky squarely ruled that legislative division of the state into congressional districts cannot be judicially reviewed in the absence of a constitutional provision controlling apportionment. It was

also pointed out that the constitution of the United States contains no direction to the states in the matter of division into congressional districts and that there was nothing in the state constitution referring to this matter. Suit was brought to declare invalid acts of 1890 and 1898, respectively, dividing the state of Kentucky into congressional districts. Kentucky was entitled to eleven congressmen and had a population of 1,648,690, making the exact proportion of population of each district 149,881. In the opinion a table is set forth showing that the eleven districts contained populations ranging from 114,024 to 188,124. In its decision the supreme court of Kentucky said:

> "There is no mention of congressional districts in the Constitution of the state; nor is there in that instrument any direction to the General Assembly as to how the districts shall be laid off. In the matter of dividing the state into congressional districts the legislature, at least so far as the power and authority of this court extends, is supreme. This court has no control over its action. It would be exceeding the power granted us to undertake to revise or annul a legislative act relating to a subject over which the legislature has absolute control. Except when limited by the Constitution of the state, the General Assembly, especially in administrative and political affairs, is beyond the reach of the judiciary of the state. We have no authority to pass judgment upon its acts. * * * If, in the matter of dividing the state into congressional districts, this court should undertake to declare invalid the division made by the legislative department, it would simply result in setting up our judgment against the judgment of the members elected for the purpose of performing this duty. We would be putting up our opinion against

those in whom the exclusive right to regulate this matter had been lodged, and be arrogating to ourselves wisdom, honesty and fairness superior to those charged by law with the control of these matters. *Moore vs. City of Georgetown*, 127 Ky. 409, 105 S. W. 905, 32 Ky. Law Rep. 323. When the Legislature has exceeded its legitimate powers by enacting laws in conflict with the Constitution or that are prohibited by it, we have not hesitated to interpose the veto power lodged in the judiciary for the purpose of preserving the integrity of the organic law under which all departments of the state government were created and live, and to which all of them owe obedience. And so, when the General Assembly in the division of the state into senatorial and legislative districts grossly violated that provision of the Constitution directing that the districts should be 'as nearly equal in population as may be,' we exercised the power vested in the judiciary to protect from invasion by whatever source the fundamental law of the state, and declared the act invalid. *Ragland vs. Anderson*, 125 Ky. 141, 100 S. W. 865, 30 Ky. Law Rep. 1199. But in the matter of congressional districts we find nothing in our State Constitution to guide us. There is nowhere any limitation upon the power of the Legislature, and it would be assuming authority this court does not possess if we undertook to control a co-ordinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency, or propriety of laws enacted by the General Assembly, unless they conflict with the Constitution.

* * * * * * * * *

"Nor do we find in the Constitution of the United

States any direction to the states upon this subject. The only provisions in that instrument relating to it are these: Section 4, Art. I, provides: 'The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing senators.' And the Fourteenth Amendment provides: 'Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.' It will thus be seen that the Constitution of the United States has left matters relating to congressional districts to the disposition of the states. Nor has the Congress of the United States undertaken to legislate upon the subject except to provide 'that the number of Congressmen to which each state may be entitled in Congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants.' The said districts shall be equal to the number of representatives to which such state may be entitled in Congress, no one district electing more than one representative.' What right, if any, Congress has to control or supervise the action of state legislatures in the division of the states into congressional districts, we need express no opinion in the absence of a judicial determination by the Supreme Court of the United States of the power of Congress to control the states in this matter."

Under Article I, section 5 of the constitution of the United States each house in congress is the judge of the elections

returns and qualifications of its own members. If congress is of the opinion that the 1911 Act is still in force and has been ignored by the Minnesota legislature it may refuse to seat the congressmen elected from this state. The state of Minnesota is satisfied, and the supreme court of that state has held that inequalities of various congressional districts are not such as to call for judicial interference. This is a matter primarily for Minnesota, acting through its legislature. So long as nine representatives in congress are fairly elected and present themselves for service in the national house of representatives with proper credentials it is not a matter of any particular consequence to the rest of the United States as to precisely how many constituents each congressman has. Each congressman represents the entire state from which he is elected and congress has always seated persons even though elected on a ticket at large rather than by districts as required by existing federal statutes.

See Election Contest Cases, cited under Point 1.

6. THAT H. F. 1456 IS A VALID DETERMINATION BY THE LEGISLATURE HAS BEEN FORECLOSED BY THE DECISION OF THE SUPREME COURT OF MINNESOTA.

As previously pointed out, the main object of petitioner's action in the state court was to have H. F. 1456 declared invalid because not adopted in accordance with the requirements of the state constitution. Petitioner's contentions were determined to be unsound by the supreme court of Minnesota. This seems to foreclose further inquiry. The petitioner has no right guaranteed to him by the federal constitution or federal statutes that actions of a state legislature shall follow any particular procedure. The matter of procedure is for the people of each state. The federal

constitution delegates to the legislature of each state a right to act in prescribing the times, places and manner of electing representatives in congress. Whether the legislature shall prescribe these regulations by statute, joint resolution or otherwise, whether the regulations shall be subject to veto power or referendum is left to the determination of each state.

State of Ohio on relation of Davis vs. Hildebrant, 241 U. S. 565.

In *Anthony vs. Burrow,* 129 Fed. 783 (787), it was said that:

"The power to determine the number of representatives in congress and to apportion that number among the several states resides in and can be exercised only by the congress of the United States. In the exercise of that power the reapportionment act from which the above quotation is made was enacted, fixing the number of representatives in congress from the state of Kansas at eight, and providing for their election. But the power to divide the territory of a state into congressional districts, for the purpose of selecting members of congress apportioned to a state is a power residing in the legislature of the state, and not in the congress of the United States, as is recognized by said act of congress. In the exercise of that power the act of the legislature of 1897 was passed, taking the county of Pottawatomie from, and adding the county of Shawnee to, the first congressional district. Hence it is apparent that the right of Shawnee county to participate in the proceedings of the Holton convention, under the averments of complainant's bill does not depend upon the true construction of the 'reapportionment

act of congress, but does depend upon the validity of the act of the legislature of the state placing the county of Shawnee in the first congressional district; and the validity or invalidity of that act of the legislature is a question for the determination of the courts of the state, and does not involve a federal question for determination by this court, unless the further contention made by solicitors for complainant may be sustained."

The court held that the federal district court sitting in equity had no jurisdiction to grant an order requiring a state officer to certify the nomination of a certain person as a candidate for representative in congress or from restraining the proper officers of the state acting under a state statute from issuing a certificate of nomination to a candidate for representative in congress upon the ground that the court had no jurisdiction.

Petitioner's action in the court below was based upon the theory that H. F. 1456 was not a valid act of the legislature because the legislature did not proceed in accordance with the state constitution.

The authorities are squarely to the effect that the proceedings of a state legislature in the enactment of a law do not give rise to a federal question, but that the determination of the state court that a state law has been validly enacted is final.

Smith vs. Jennings, 206 U. S. 276.

Merchants & Manufacturers National Bank vs. Pennsylvania, 167 U. S. 461.

Montana vs. Rice, 204 U. S. 291.

King vs. West Virginia, 216 U. S. 92.

"The question whether or not a state statute conflicts with the constitution of the state does not present any

question for review by the supreme court of the United States * * *."

Vol. 5, *Hughes Federal Procedure*, § 3242.

While the authority to create congressional districts comes from the federal constitution, it is vested in state agencies, to-wit: the legislatures, and it is for the courts of the several states to say what constitutes the legislatures and whether or not the acts of such legislatures are valid. Assuming for the sake of argument, that the federal constitution permits such legislation, it is then for congress to say whether the governor shall be a part of the federal machinery in the redistricting matter. Until congress does so act, the question is left to the state legislatures and it is for the state courts to decide the legal question here at issue.

CONCLUSION.

It is respectfully submitted that this case was correctly decided below and that no federal question is presented invoking the reviewing power of this court.

Respectfully submitted,

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